CHEVRON U.S.A., INC.

IBLA 83-51 Decided May 8, 1984

Appeal from decision of California State Office, Bureau of Land Management, rejecting a noncompetitive oil and gas lease offer. S-5305.

Affirmed in part; set aside in part and remanded.

1. Endangered Species Act of 1973: Section 7: Generally-- Oil and Gas Leases: Discretion to Lease--Oil and Gas Leases: Lands Subject to

   BLM may, in its discretion, reject any offer to lease Federal lands for oil and gas upon a determination supported by facts of record that leasing would not be in the public interest, e.g., where leasing might adversely affect the Yuma clapper rail, a federally listed endangered species.

2. Endangered Species Act of 1973: Section 7: Generally-- Oil and Gas Leases: Discretion to Lease--Oil and Gas Leases: Lands Subject to

   Where BLM rejects an oil and gas lease offer, in order to protect a federally listed endangered species, the record should ordinarily reflect consideration of whether leasing subject to protective stipulations, including no surface occupancy, would not adequately serve the public interest. Where the record indicates that BLM failed to consider alternatives to no leasing, the case will be remanded to BLM for such an assessment.

3. Endangered Species Act of 1973: Section 7: Generally-- Oil and Gas Leases: Discretion to Lease--Oil and Gas Leases: Lands Subject to

   BLM may properly reject an oil and gas lease offer in order to protect a federally listed endangered species pending the availability of further studies of the effect of oil and gas exploration and development on a resident population of that species.

APPEARANCES: J. D. Froggatt, Assistant Secretary, Chevron U.S.A., Inc., for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Chevron U.S.A., Inc., has appealed from a decision of the California State Office, Bureau of Land Management (BLM), dated August 24, 1982, rejecting its noncompetitive oil and gas lease offer S-5305.

On August 15, 1972, the Standard Oil Company of California, of which appellant is a wholly-owned subsidiary, filed a noncompetitive oil and gas lease offer for 240 acres of land situated in Riverside County, California, on the shores of the Salton Sea, pursuant to section 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226 (1982). 1/ By decision dated June 9, 1982, following preparation of a final environmental assessment (FEA) entitled "Potential Impacts Resulting From Leasing of the Hydrocarbon Resources at the Salton Sea -- Riverside and Imperial Counties, California" and a decision option document (DOD), BLM required payment of additional rental and execution of stipulations as a condition of issuance of an oil and gas lease. Issuance of the lease was made contingent in part on execution of a special stipulation which stated: "For the protection of sensitive species and recreation uses, no surface occupancy will be permitted in inundated areas from the shoreline outwards one mile and identified as zone 1B as shown on the attached map." Zone 1B included a portion of the land in appellant's lease offer. 2/ In its August 1982 decision, BLM modified the June 1982 decision rejecting appellant's oil and gas lease offer in its entirety. BLM rejected the lease offer under its discretionary authority, based on a formal consultation with the U.S. Fish and Wildlife Service (FWS), pursuant to 50 CFR 402.04, which "reached the conclusion that oil and gas leasing on the subject lands would jeopardize the continued existence of the Yuma clapper rail," a federally listed endangered species.

In rejecting appellant's lease offer, BLM relied on a July 30, 1982, letter to the District Manager, California Desert District, BLM, from the Area Manager, Fish and Wildlife Service (FWS letter), which assessed the impact of the proposed leasing of hydrocarbon resources, covering approximately 309,760 acres, in and around the Salton Sea on two endangered species, the Yuma clapper rail (YCR, rail) and the Aleutian Canada goose, and two candidate endangered species, the desert pupfish and the flat-tailed horned lizard. 3/ The rail and the Aleutian Canada goose had been designated as endangered, pursuant to the Endangered Species Act of 1973, as amended,

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1/ The land is described as follows: SE 1/4, S 1/2 NE 1/4 sec. 32, T. 7 S., R. 9 E., San Bernardino meridian.

2/ The oil and gas leases within the Salton Sea area were zoned for four different classes of occupancy: (1) Full leasing, with full surface occupancy (zone III); (2) full leasing, with temporary surface occupancy during exploration during exploration only (zone II); (3) full leasing, with no surface occupancy (zone I (b)); and (4) full leasing, with an advisory note. The latter note provides for the protection of the Neanthes or pile worm.

3/ The proposed action would involve the following activities: (1) Preliminary investigations, particularly seismic-type geophysical surveys; (2) issuance of oil and gas leases; (3) exploration of hydrocarbon resources, and subsequent development and production of any found; (4) issuance of support rights-of-way as necessary for pipelines in the area; and (5) issuance of new rights-of-way necessary to support production, conservation, and transportation of the hydrocarbon resources (FWS letter at 2-3).

16 U.S.C. § 1531 (1976). 4/ The August 1982 BLM decision relied solely on the threat posed to the rail from oil and gas leasing in rejecting appellant's lease offer. We will, therefore, focus on that threat.

The resident population of the rail in the Imperial Valley area of California was estimated at about 242 in 1978, or approximately one-third of the total population in the United States. The rails are present at the Salton Sea from mid-March to October, and are found primarily in the marshes bordering the south end of the Salton Sea. The rails are already threatened by a number of factors: Rising water levels combined with surface subsidence inundating large tracts of marsh habitat; pollution from agricultural pesticides, fertilizers and mosquito abatement chemicals; and rising salinity.

The analysis of impacts in the FWS letter is prefaced with a statement that the map which identified the zones within the Salton Sea may be

> out of date in relation to the current shoreline elevation and perimeter of the Sea. The current water level of the Salton Sea appears higher than shown on the base map, thus, some of the leases shown to be onshore may now actually be offshore. Therefore, some of the leases occurring in Zones I(A), I(B), II, and III, may need to be reclassified in relation to their distance from the current shoreline. For instance, some of the areas leased with surface occupancy in the zone I(A) onshore area, may currently be offshore, and would fall within Zone I(B) with no surface occupancy.

(FWS letter at 10-11).

The FWS letter first addressed the effect of leasing for natural gas. FWS concluded that offshore leasing for natural gas in zone 1B "poses no threat to the YCR," except in certain areas not involved herein. Id. at 11. However, FWS concluded that onshore leasing for natural gas in zone 1A "poses a number of threats" to the rail (id. at 12), specifically in four areas, including "the Whitewater River delta (T. 7 S., R. 9 E., sec. 32, E 1/2)" (id. at 11). These four areas provide "most of the highest quality YCR habitat and support approximately 85 percent (about 200 rails) of the YCR population at the Salton Sea." Id. at 12. 5/

The first threat from surface occupancy is "direct habitat destruction." Id. FWS stated: "In the current absence of appropriate mitigation measures in the proposed action, we assume that YCR habitat would be destroyed and

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4/ The FWS letter focused on the impact of leasing on the Yuma clapper rail and the desert pupfish, concluding that the population of the Aleutian Canada goose was too small to be affected and that there was inadequate information with regard to the flat-tailed horned lizard.

5/ The other three areas are "the New River delta (T. 12 S., R. 12 E., Sec. 14 SW 1/4), adjacent to (and in) Unit 1 of the Salton Sea NWR (T. 12 S., R. 12 E., Sec. 20 SE 1/4, 28 N 1/2), and three sections adjacent to the Wister Waterfowl Management Area (T. 11 S., R. 13 E., Sec. 2 NW 1/4; T. 10 S., R. 13 E., Sec. 10 NE 1/4, 14 SE 1/4)" (FWS letter at 11-12).

that rail populations would be extirpated, unless or until BLM invokes Standard Stipulation Number 9." Id. With regard to other threats from surface occupancy, FWS further stated:

> Other less obvious but also potentially important adverse effects to the YCR, resulting from surface occupancy in the above described areas, include human related disturbance and mortality, pollution from drilling wastes leaching from sumps, incidental or accidental spills and blowouts, noise pollution, increased access to the public, and induced seismicity and surface subsidence. It is difficult to assess the degree of harm that would result from most of these impacts, but given the fact that the leasing proposal provides little or no mitigation to offset such impacts, we assume they will occur and would be serious. All of the above could be avoided by prohibition of surface occupancy in marshland habitats, and in an appropriate buffer zone around such habitat (as specified in mitigation measure #37 in the FEA but not included in the proposed action), except induced seismicity and surface subsidence.
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> The FEA documents that natural subsidence is a major phenomenon in the region. A vertical movement of -19 inches was measured at Niland between 1972 and 1978. A subsidence rate of about -1 inch per year is inferred to occur in the study area as a whole. The DEA [Draft Environmental Assessment] indicated that increased subsidence and induced seismicity could result from natural gas production. To offset this potential impact, a corresponding mitigation measure (#14) was proposed in the DEA, requiring injection of surface and formation waters. Inexplicably, a discussion of impacts relating to natural or induced subsidence was not included in the FEA or DOD, nor were mitigation measures proposed to prevent this. We cannot, in like manner, overlook this potential hazard.
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> Surface subsidence associated with gas development on nearshore and onshore leases, in or near marsh habitats, could permanently inundate YCR habitat. This is a real danger because in some areas, subsidence of only a few inches could submerge several acres of YCR habitat. The phenomenally high incidence of seismic activity in the Salton Sea region could increase the likelihood of subsidence. The potential for induced subsidence and resultant extirpation of the YCR from inundated areas, coupled with BLM's lack of supporting data for deleting its earlier impact analysis and recommended mitigation measure (DEA #14), mandates that we assume a worst case situation, until sufficient information becomes available indicating otherwise. [Emphasis added.]

Id. at 12-13.

The FWS letter next addressed the effect of leasing for oil. FWS noted that BLM had "dismissed" the possible impacts to the YCR in the FEA and DOD and that "the proposed action contains no special environmental safeguards to protect the Salton Sea ecosystem and YCR habitat should oil be discovered and subsequently developed." Id. at 13.

FWS further stated:

> Our two comment letters to BLM during development of the DOD and FEA were largely ignored, in which we recommended that appropriate contingency actions be formulated to cover the eventuality of an oil discovery and concomitant spills. The FEA and DOD contend that the probabilities of discovering oil and the occurrence of oil spills are so low that oil leasing would occur at an acceptable risk level. This decision was made even though the FEA concluded that "Accurate quantification of the probability without drilling data is not possible...". The proposed action also dismisses BLM's own impact analysis included in the DOD (Attachment B) which states "It would probably be a prudent assumption to expect at least one major spill during the life of possible Salton Sea development." It goes on to state that "Chronic small spills would be of as much concern, perhaps even more so, since the company(ies) involved may be less inclined to actively pursue clean-up activities for such spills." Because the probability of striking oil is not known and because the possibility exists for subsequent blowouts and oil spills (especially small spills), we cannot dismiss associated potential impacts on the YCR.

Id.

FWS stated that the Whitewater River delta is "vulnerable" to oil pollution from offshore leasing, but that it "might not be expected to be fouled under the prevailing northwesterly wind pattern." Id. at 14. However, oil pollution could have several impacts:

> Obviously, rails could be oiled, which in many cases would result in mortality. Crayfish and invertebrate food sources would decline, probably resulting in food stress and starvation. Polluted food sources could be toxic to rails and contribute to additional mortality. Marsh vegetation coated with oil would be unattractive and unsuitable to rails, probably causing emigration from degraded habitat. Depending on how widespread the spill might be, alternative habitats might not be available. All of the above impacts would vary, of course, in response to the severity of the spill.

Id. With respect to the timing of an oil spill, FWS stated:

> Although the effects of fouling could be cleaned-up or would be naturally abated to some degree before the following YCR breeding season, should the spill occur during the winter, long-term adverse effects would be expected. However, if the spill occurred during the breeding season, effects on the YCR could be immediate and severe.

Id. at 14-15.

With respect to onshore leasing for oil, FWS stated that it would pose "similar threats" to those posed by offshore leasing and, in addition, the

threat of habitat loss and surface subsidence, as with onshore leasing for natural gas. Id. at 15. FWS concluded its assessment of the environmental impact of leasing for oil on the rail as follows:

> In summary, the FEA and DOD did not analyze impacts associated with potential oil development, nor did they examine seismic threats to waste disposal sumps, and oil pipelines (although such threats were addressed relative to drilling operations). The above represents a preliminary review and many unanswered questions remain. Considering the potential for severe effects and the current lack of any in depth impact analysis or proposed mitigation, a pressing need exists to resolve the concerns discussed above. Thus, we recommend that BLM not issue offshore leases until potential impacts are addressed and appropriate mitigation and compensation developed.

Id. Based on all of its analysis, FWS stated that the proposed action is "likely to jeopardize the continued existence of the Yuma clapper rail," due to the direct loss of habitat and induced surface subsidence "associated with proposed leasing areas with surface occupancy and no surface occupancy." Id. at 20 (emphasis added). FWS proposed that BLM not issue hydrocarbon leases in certain areas, including "T. 7 S., R. 9 E., Sec. 32 E 1/2." Id. The areas were primarily those areas identified as collectively providing "most of the highest quality YCR habitat." Id. at 12. FWS also detailed a list of mitigation and protective measures with respect to the leasing of hydrocarbon resources in other areas of the Salton Sea. In particular, FWS recommended that BLM not issue offshore leases until the potential impacts of oil exploration and production had been assessed and appropriate environmental safeguards implemented, including "requirements as stipulated in the DOD (Mitigation Measure #19) and the development of an oil spill contingency plan specially formulated for the Salton Sea." Id. at 21. FWS also recommended that BLM require "measures at least as effective as injection of surface and formation waters to alleviate the threat of surface subsidence." Id. at 22.

In its statement of reasons for appeal, appellant contends that the subject land is "isolated" by private land and the Torres Martinez Indian Reservation and "could be developed from off lease drillsites." Appellant requests that the BLM either issue a lease with no right of surface entry or that its noncompetitive oil and gas lease offer be held pending "additional studies," as suggested in the FWS July 1982 letter. 6/ Appellant also notes that BLM has already issued leases "onshore on the east side of the sea." In its July 1982 letter, FWS explained that three oil and gas leases were issued "[d]uring the consultation process" and apparently without knowledge of that process. Id. at 2. Two of the leases are located "onshore on the east side of the sea." Id. at 3.

6/ Appellant also states that BLM acted inconsistently in that it would issue a lease with no surface occupancy if the subject land was inundated in whole or in part, but rejected appellant's offer "since the land is upland." We can discern no inconsistency. In its August 1982 decision, BLM rejected appellant's offer both as to lands offshore (zone 1B) and onshore (zone 1A).

[1] Under the provisions of section 17 of the Mineral Leasing Act, supra, public lands are available for oil and gas leasing at the discretion of the Secretary of the Interior. Udall v. Tallman, 380 U.S. 1, rehearing denied, 380 U.S. 989 (1963). Accordingly, the Secretary has authority to refuse to lease lands for oil and gas purposes, even if the lands have not been withdrawn from the operation of the mineral leasing laws. Id. A BLM decision rejecting an oil and gas lease offer will be affirmed where it is supported by facts of record that leasing would not be in the public interest, provided an appellant does not establish compelling reasons for modification or reversal. Rachalk Production, Inc. (On Reconsideration), 71 IBLA 360 (1983), and cases cited therein.

Section 7(a)(2) of the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1536(a)(2) (1982), requires that Federal agencies ensure that actions taken by them are "not likely to jeopardize the continued existence of any endangered species." (Emphasis added.) The underscored language from the statute is defined as engaging "in an activity or program which reasonably would be expected to reduce the reproduction, numbers, or distribution of a listed species to such an extent as to appreciably reduce the likelihood of the survival and recovery of that species in the wild." 50 CFR 402.02.

Nothing in the Endangered Species Act or its implementing regulations prohibits oil and gas leasing, even where it would affect a federally listed endangered species or its critical habitat. Esdras K. Hartley, 57 IBLA 319 (1981). It follows, therefore, that a conclusion by FWS that oil and gas leasing would be likely to jeopardize the continued existence of a federally listed endangered species is not binding on BLM. However, as we said in Placid Oil Co., 58 IBLA 294, 301 (1981): "There is no question that protection of the habitat of a species of animal, especially one listed as endangered by either the state or Federal Government, is in the public interest."

[2] The prohibition of oil and gas leasing is the most restrictive measure which can be imposed in the protection of an endangered species. We have long held that where BLM refuses leasing, the record should reflect that BLM has considered whether leasing subject to reasonable stipulations, including no surface occupancy, would be sufficient to protect the public interest. Robert G. Lynn, 76 IBLA 383 (1983); Mary A. Pettigrew, 64 IBLA 336 (1982). In the present case, we cannot say that BLM has fully considered such alternatives. Accordingly, we will remand the case for that purpose, as outlined below.

With respect to the leasing of onshore areas for oil and gas exploration and development, there appears from the FWS letter to be an appropriate protective measure which could be adopted with regard to every potential threat to the rail population. A no surface occupancy stipulation would generally be adequate to protect the rail from all threats, except induced seismicity and surface subsidence. The FWS letter states, at page 12, that: "All of the above [adverse effects] could be avoided by prohibition of surface occupancy in marshland habitats * * * except induced seismicity and surface subsidence." With respect to the latter threat, FWS observed BLM had originally proposed mitigation measure #14 in the DEA, involving the injection of surface and formation waters. FWS apparently regarded this measure as adequate because it was recommended that BLM impose such a requirement in oil

and gas leases covering other areas in the Salton Sea. Id. at 22. However, the record is sufficiently unclear as to the adequacy of that measure that, upon remand, BLM should undertake to assess its adequacy. Generally, however, it appears that FWS, in recommending no leasing with respect to onshore areas, based its recommendation on the assumption that BLM would only lease such areas with full surface occupancy. The recommendation, therefore, was based on an incorrect assumption. BLM could, considering the analysis of biological impacts assessed by FWS, lease with no surface occupancy or any other protective measure. Despite this circumstance BLM appears to have accepted the FWS recommendation on its face. There is no evidence that BLM considered the alternatives to no leasing after receipt of the FWS recommendation, even though the recommendation was a complete reversal of its original policy, identified in the FEA, of leasing onshore areas with full surface occupancy. Accordingly, we must remand this case to BLM with instructions to reassess whether leasing subject to protective stipulations, especially no surface occupancy, would be adequate to protect the population of rail inhabiting onshore areas. BLM may properly reaffirm a policy of no leasing even after considering all manner of protective stipulation, where leasing, however limited, still has the potential to adversely affect an endangered species. Riverside Irrigation District v. Andrews, 568 F. Supp. 583, 589 (D. Colo. 1983).

[3] With respect to the leasing of offshore areas for oil and gas exploration and development, the FWS letter identified the primary threats to the rail population in the Whitewater River delta area to be those associated with an oil spill. However, FWS recognized that there are several unanswered questions. The first question is the probability of an oil spill. The next question is the probability that an oil spill would affect the Whitewater River delta area. The final question is the potential effect of an oil spill on the rail population. These questions must be answered in order to determine whether leasing for oil and gas is "likely" to jeopardize the continued existence of the rail, within the meaning of section 7(a)(2) of the Endangered Species Act of 1973, supra. FWS stated that these questions have not been adequately answered by BLM. In addition, FWS stated that BLM had not considered the development of an oil spill contingency plan. There is nothing in the FWS letter which indicates that such a plan would not be adequate to protect the rail population from the adverse effects of an oil spill. Essentially, FWS recommended no leasing until potential impacts of oil exploration and production could be assessed and environmental safeguards implemented. Id. at 21. BLM presumably adopted that recommendation. We conclude, therefore, that with respect to the leasing of offshore areas for oil and gas exploration and development, BLM properly rejected an oil and gas lease offer pending further studies. Such an action was within the discretion of BLM under section 17 of the Mineral Leasing Act, supra. The facts of record clearly do not support a conclusion that oil and gas leasing is likely to jeopardize the continued existence of the rail in offshore areas. Nevertheless, a determination under section 7(a)(2) of the Endangered Species Act of 1973, supra, was not necessary to support a no leasing decision. It was sufficient that neither FWS nor BLM had sufficient information to judge the effect of oil and gas leasing. Protection of an endangered species pending the availability of further studies is consistent with the objectives of the Endangered Species Act of 1973 and in the public interest. Placid Oil Co., supra. We are mindful of the admonition in the Act that the Department must

"insure" that any authorized action is not likely to jeopardize the continued existence of an endangered species. 16 U.S.C. § 1536(a)(2) (1982). To act without knowledge of the consequences of those actions would not conform to this statutory duty. Because we distinguish between onshore and offshore areas in terms of our final decision, on remand BLM should clarify which areas fall in each category, in view of the statements in the July 1982 FWS letter that the boundary between zones 1A and 1B may have shifted.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside in part and affirmed in part and the case is remanded to BLM for further action consistent herewith.

Franklin D. Arness
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge;

Will A. Irwin
Administrative Judge